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HAROLD B. WILLEY

IN THE

Supreme Court of the United States

October Term, 1954

No. 383

FRANK BURO (Claim No. 28954), JAMES CARDINO and MICHAEL CARDINO (Claim No. 28955), MARIA GRIMALDI (Claim No. 28956), MARY MAROTTA (Claim No. 28957), ANTONIO MUSTO and MARIA MUSTO (Claim No. 28958), SALVERIO MUSTO (Claim No. 28959), ANTONIO PETTI (Claim No. 28960), ANGELINA VOLPE and GUISEPPE SCHIBANO (Claim No. 28961), NAT ZIMMERMAN and BENJAMINS REALTY CORPORATION (Claim No. 28962), LUCIA AQUAVELLA, CHARLES P. AQUAVELLA and LORETTA AQUAVELLA (Claim No. 28988), NICOLINA COGLIANO (Claim No. 28989), YOLANDA COGLIANO PESCA (Claim No. 28990), ANTONIO MACCARILLO (Claim No. 28991), MARIA PESCA (Claim No. 28992) and MAMIE SHAKIN (Claim No. 28993),

Petitioners,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

NOTE—The claim numbers are those of the Court of Claims of the State of New York where total judgments were awarded of $24,500.00.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK ~~AND BRIEF IN SUPPORT THEREOF~~

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IN THE

Supreme Court of the United States

October Term, 1954

No. .....

FRANK BURO (and fourteen other petitioners),

Petitioners,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

To the Honorable, The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States.

Your petitioners Frank Buro, James Cardino and Michael Cardino, Maria Grimaldi, Mary Marotta, Antonio Musto and Maria Musto, Salverio Musto, Antonio Petti, Angelina Volpe and Guiseppe Schibano, Nat Zimmerman and Benjamins Realty Corporation, Lucia Aquavella, Charles P. Aquavella and Loretta Aquavella; Nicolina Cogliano, Yolanda Cogliano Pesca, Antonio Maccarillo, Maria Pesca and Mamie Shakin, respectfully represent the following:

SUMMARY STATEMENT OF MATTER INVOLVED

Pursuant to ch. 677, L. 1928, as amended and supplemented by ch. 289, L. 1939, the Transit Commission of the State of New York, since succeeded by the Public Service Commission, ch. 170, L. 1943, by Order dated October 7, 1938, authorized the elimination of grade crossings on Atlantic Avenue from East New York (Brooklyn, New York City) to Jamaica (Borough of Queens, New York City) (fol. 63, Claimants' Exhibit 41, printed at p. 474). The said Transit Commission only so acted after resolutions of the Board of Estimate of the City of New York requesting the same (Claimants' Exhibits 38 and 40, pp. 471, 473).

As a result a viaduct highway was constructed between Eastern Parkway, also known as Stone Avenue, and Georgia Avenue, Borough of Brooklyn, New York City, in the middle of Atlantic Avenue, between two retaining walls, two feet thick consisting of concrete faced with stone masonry, was 53 feet wide and the height varied from 5 to 26 feet measured from the base of the wall to the top of the wall with the viaduct highway about 3 or 4 feet below the top of the wall (fols. 334-336).

This viaduct highway was completed the latter part of September, 1943, and was opened for public use under the jurisdiction of the Borough of Brooklyn, New York City, on November 18, 1943 (fols. 305-306).

The petitioners consist of two groups of Claimants. Ten of them, the western group own property abutting on both sides of Atlantic Avenue between Eastern Parkway (Stone Avenue) and Sackman Street, Brooklyn, New York City,

where prior to the viaduct highway, the railroad operated in a right of way, thirty feet wide in an open railroad cut entirely below the surface of the street (fols. 60-62, State's Exhibit C, to be printed in the Appendix). Five of the Claimants (James Cardino and Michael Cardino, Maria Grimaldi, Antonio Musto and Maria Musto, Salverio Musto and Maria Pesca compose the Eastern group, owners of property abutting on Atlantic Avenue, between Williams and East New York Avenue on the north side of the street and between Williams Avenue and Hinsdale Street on the south side of the street, where prior to the construction of the viaduct highway the railroad tracks started at grade at East New York Avenue, ascended on a ramp to Williams Avenue, thereafter continuing easterly on an elevated structure (fols. 60-63).

The height of the viaduct as to the respective properties varied from 7.51 to 17.05 feet as to the ten western group of Claimants and from 2.86 to 5.99 feet higher than the old railroad ramp as to the five eastern group of Claimants (State's Exhibit D-1 printed at p. 537).

The viaduct is part of a general arterial highway system connecting the Boroughs of Brooklyn and Queens with heavy and continuous travel. The average automobile is six feet high and trucks vary from 8 to 9 feet (336-338).

Computations[1] made from State's Exhibit C, printed in the Appendix, show that the viaduct highway width extends beyond the 30 foot railroad right of way on each the north and south side of the railroad cut from 9.4 to 13.8 feet as to the western group, *an average of 11½ feet or a*

1. By adding the width of the sidewalk and roadway before and after as to each parcel and taking the difference.

25% reduction in the width of the street, and as to the eastern group from 1.7 to 5.8 feet, except one of the parcels in the eastern group, Cardino Claim #28955, is shown as gaining 1.6 feet in the before and after measurements in the street, but the State's engineer testified that the distance at this location on the north side of Atlantic Avenue was approximately 45 feet before and 44 feet after and on the south side was 45 feet before and 34 feet after (1039-1041).[2] As to this Eastern group there appears to have been a variance from the 30 foot railroad right of way as necessary to construct the former railroad ramp with the elevated structure.

As to access the western group lost through a 25% narrowing of Atlantic Avenue and the removal of the overhead foot bridge at Sackman Street for which was substituted an underpass which is subject to being flooded and not safe for usage in the evenings or night hours (1344-1345) and the eastern group through the narrowing of Atlantic Avenue, also through the removal of the Williams and Alabama Avenues crossings and the loss of East New York Avenue (now an underpass), for pedestrian crossing and requiring a circuitous route to use for vehicle travel (State's Exhibit A received in evidence) (fol. 990).

All of the claimants have had their easements of light and air impaired. The Western group lost the previous clear view across the street and the free circulation of light and air over the same. The eastern group lost due

2. Atlantic Avenue is 120 feet wide (Ch. 217, Laws 1869 and Ch. 619, Laws 1870). The railroad right of way is 30 feet. This left 45 feet roadways on each side. Viaduct 53 feet left 33.50 feet on each side. (State's Exhibit C printed in the Appendix.)

to the increased height of the viaduct over that of the old railroad ramp.

JURISDICTION

In the Court of Appeals petitioners urged in their Brief and on the argument that two constitutional questions were involved, as follows:

FIRST: Where there is a statute, Section 307-a 3.0 of the Administrative Code of the City of New York (formerly Sec. 951 of the Greater New York Charter) providing for damages in a change of grade proceeding as the basis for liability by the State and the purpose of the Atlantic Avenue Improvement Act (L. 1897 Ch. 499) was to provide that the railroad no longer rest on the surface of Atlantic Avenue (*Matter of Long Island Railroad Company*, 189 N. Y. 428, at p. 440), can the State at the request of the City take possession, subject to the railroad operation, of the middle of Atlantic Avenue, a public street, and erect a viaduct highway 53 feet wide and 5 to 26 feet high extending continuously from Eastern Parkway to Georgia Avenue, Brooklyn, New York City, and avoid payment of damages to abutting property owners for impairment of their easements of light, air and access without violating the provision of the 14th Amendment of the Federal Constitution prohibiting the taking of property without just compensation?

SECOND: Where there is a statute, Section E 15-3.0 of the Administrative Code of the City of New York providing for damages in street closing proceedings and one of the purposes of the Atlantic Avenue Improvement Act

(L. 1897 Ch. 499) as to the elevated portion of the railroad, was to have it operate "on an elevated steel structure over the right of way of said railroad companies as now in possession at such grade elevation that they shall cross all intervening streets and avenues at such grade as to leave the same unobstructed on the surface, and open to the free passage of pedestrians and vehicles" (*Matter of Long Island Railroad Company,* 189 N. Y. 428, at p. 441), can the State avoid payment of damages to abutting property owners for impairment of their easements of access by the blocking off and enclosing within a viaduct highway the two public street crossings of Williams and Alabama Avenues without violating the provision of the 14th Amendment of the Federal Constitution prohibiting the taking of property without just compensation?

The Court below by a divided decision, affirmed the Appellate Division, Third Department, which reversed the judgments in the total sum of $24,500.00 awarded to the petitioners in the New York State Court of Claims. The said Memorandum decision, 306 N. Y. (Mem.) 730. Advance sheet No. 776, is printed in the Brief annexed hereto. Motions to have the Court certify that a Constitutional question was involved and for reargument of the appeals were denied (March 11, 1954 and April 15, 1954 without opinions (306 N. Y. 851 and 941, Advance sheet Nos. 783 and 788). The judgments which petitioners seek to review were entered July 6, 1954, pursuant to the Orders of the Court of Appeals.

We submit that the minority opinion conforms with the Law as defined by this Court. Also that easements of light, air and access are property rights and the abutting property owners cannot be deprived of the same or have

them impaired without the payment of just compensation and that the attempt to do so violates the provisions of the Fourteenth Amendment of the United States Constitution.

QUESTION PRESENTED

Is it a violation of the Fourteenth Amendment of the United States Constitution to permit the impairment of the easements of light, air and access of these abutting property owners, the petitioners herein, without the payment of just compensation?

REASONS RELIED ON FOR GRANTING WRIT

We submit that the minority decision of the Court below conforms with the law as defined in this Court and if the majority decision is allowed to stand it results in a violation of the Constitutional rights of the petitioners.

Siegel v. *New York & Harlem R. R. Co.*, 200 U. S. 615, reversed same case, 173 N. Y. 644; 62 App. Div. 290. This Court reversed the New York Court of Appeals and remanded the action for further proceedings not inconsistent with the opinions of this Court in—

Mulker v. *New York & Harlem Railroad Co.*, 197 U. S. 544;

Birell v. *New York & Harlem Railroad Co.*, 198 U. S. 390;

Kierns v. *New York & Harlem Railroad Co.*, 198 U. S. 390.

WHEREFORE, your petitioners, pray that a Writ of Certiorari may issue out of this Court under the seal of this

Court, directed to the Court of Appeals of the State of New York, commanding the said Court to certify and send to this Court for review and determination, as provided by law, this cause and a complete transcript of the record and all proceedings had herein; and that the Order of the Court of Appeals of the State of New York, affirming the reversal by the Appellate Division, Third Department, of the judgments awarded the petitioners by the Court of Claims of the State of New York, be reversed, and that the petitioners may have such other and further relief in the premises as the Court may deem proper.

Dated, Brooklyn, New York City, August 31, 1954.

FRANK BURO
JAMES CARDINO and MICHAEL CARDINO
by JAMES CARDINO

MARIA GRIMALDI
MARY MAROTTA
ANTONIO MUSTO and MARIA MUSTO
by ANTONIO MUSTO

SALVERIO MUSTO
by MARY MUSTO PETROCIA

ANTONIO PETTI
ANGELINA VOLPE and GUISEPPE SHIBANO
by GUISEPPE SHIBANO

NAT ZIMMERMAN and BENJAMINS REALTY CORPORATION

by NAT ZIMMERMAN

LUCIA AQUAVELLA, CHARLES P. AQUAVELLA, LORETTA AQUAVELLA

by CHARLES P. AQUAVELLA

NICOLINA COGLIANO
YOLANDA CONGLIANO PESCA
ANTONIO MACCARILLO
MARIA PESCA
MAMIE SHAKIN

Petitioners

STATE OF NEW YORK, }
COUNTY OF KINGS, } ss.:

I hereby certify that I have examined the foregoing petition for a Writ of Certiorari and that in my opinion it is well founded and the cause is one in which the petition should be granted.

Dated, August 31, 1954.

REUBEN L. HASKELL,
Counsel for Petitioners.

IN THE

Supreme Court of the United States

October Term, 1954

No. .....

FRANK BURO (and fourteen other petitioners),

Petitioners,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

~~BRIEF IN SUPPORT OF PETITION FOR CERTIORARI~~

The two opinions of the Court of Appeals of the State of New York are officially reported in 306 N. Y. (Mem.) 730. Advance sheet No. 776. Motions for certification of a Constitutional Question and reargument of the Appeals were denied without opinion. 306 N. Y. 851 and 951, Advance sheets 783 and 788. On July 6, 1954, the judgments pursuant to the Orders of the Court of Appeals were entered.

The Memorandum opinion of the Court of Appeals is as follows:

Judgments affirmed, with costs. Memorandum: "Quite clearly, there has been no change of grade and, on the weight of the evidence, there is no damage to claimants' properties by interference with their easements of light and air. No opinion. (dissenting opinion next page)

Concur: Desmond, Dye, Fuld and Van Voorhis, *JJ.* Lewis, *Ch. J.*, Conway and Froesel, *JJ.*, dissent and vote for reinstatement of the judgments of the Court of Claims on the following ground: There cannot be, in this case, any recovery of damages for change of grade as such, under section 6 of chapter 678 of the Laws of 1928 (see *Matter of Young* v. *Kracke*, 262 App. Div. 67, 68-70, affd. 287 N. Y. 634). As to the alleged damage to claimants' properties by interference with their easements of light and air, we conclude that the weight of the evidence supports the holding of the Court of Claims, a member of which court viewed the affected premises."

~~STATEMENT OF JURISDICTION, QUESTION PRESENTED AND FACTS~~

~~The statement under which jurisdiction of the Court is invoked, of the questions presented, and the factual matter relevant to this application appear in the petition to which this Brief is annexed.~~

SUMMARY ARGUMENT

POINT I

There is an abundance of authority, in similar cases, supporting awards for damages due to impairment of easements, in charge of grade proceedings.

Coffey v. *State*, 291 N. Y. 494;
Lawrence Const. Corp., et al. v. *State*, 293 N. Y. 634, 638;

Mirro v. *State,* 172 Misc. 963; 260 App. Div. 525, aff'd 285 N. Y. 678;
Askey & Hagen v. *State,* 240 App. Div. 451, aff'd 266 N. Y. 587;
Van Aken v. *State,* 261 N. Y. 360.

Siegel v. *New York & Harlem R. R. Co.* (62 App. Div. 290; revd., 173 N. Y. 644; revd., 200 U. S. 615), was remanded in the United States Court for further proceedings not inconsistent with the opinions of that Court in:

Mulker v. *New York & Harlem Railroad Co.,* 197 U. S. 544;
Birell v. *New York & Harlem Railroad Co.,* 198 U. S. 390;
Kierns v. *New York & Harlem Railroad Co.,* 198 U. S. 390.

In *Mulker* v. *New York & Harlem Railroad Co., supra,* the syllabus in part, states:

> "The permission or command of the State can give no power to invade private property rights for a public purpose without payment of compensation" * * * "The raising in pursuance of a State statute requiring it, of the New York & Harlem Railroad structure, in Park Avenue, New York City, which was formerly on or partially below the surface of the street, to an elevated structure deprived the abutting owner * * * of property rights in his easement of light, air and access under the Constitution of the United States he was entitled to compensation therefor."

Sauer v. *City of New York,* 180 N. Y. 27, 206 U. S. 536 was a case where an elevated viaduct was built on 155th

Street, New York City pursuant to a legislative act where it was held in the absence of legislation authorizing it, claimant was not entitled to relief either legal or equitable.

And in the same case in the *United States Supreme Court,* 206 U. S. 536, the Court said at page 545:

> • • • "Any establishment or change of grade made lawfully and not negligently performed, does not impose an additional servitude upon the street and hence is not within the constitutional inhibitions against taking private property without compensation, and is not the basis for an action for damages, *unless there be an express statute to that effect.*" (Emphasis ours.)

In the cases at bar, there is an express statute, and it is pointed out in the Memorandum Decision of the Court of Claims, as follows:

> "Section 307-a 3.0 of the Administrative Code of New York City (formerly Sec. 951 of the Greater New York Charter) provides liability for change of grade when an owner has built or otherwise improved his property in conformity with the lawfully established grade, and such grade is thereafter changed. See Lawrence Const. Corp., et al. v. State, 293 N. Y. 634, 638. As in the case of Mirro v. State, 172 Misc. 963, 16 N. Y. S. 2nd 819; 260 App. Div. 525, 23 N. Y. S. 2d 852, affd. 285 N. Y. 678, the State has assumed the liability imposed upon the City of New York by its charter" (fols. 69-70).

POINT II

Easements of light, air and access are property rights and petitioners have suffered damages by reason of impairment of the same. To deny them damages is a violation of the Fourteenth Amendment of the United States Constitution.

In the petition annexed hereto is shown the details wherein the easements of the petitioners were impaired. There is one of these details which we want to refer to again because the Attorney General of the State of New York in the Appellate Division, Third Department and in the Court of Appeals, set forth in the State's Brief the contention that the railroad right of way prior to this grade crossing was 50 feet in width and that therefore the viaduct was at the most only slightly outside the right of way. The State's engineer so stated as shown at folios 338-339 of the record, but the same State's engineer prepared an Exhibit C which was received in evidence (fol. 1004) and is printed in the Appendix. It shows the before and after widths of the sidewalks and roadway and by mere computation[3] that before this viaduct the street on each side was 45 feet (twice 45 or 90 feet added to a right of way of 30 feet made up the total width of the street, viz; 120 feet), whereas after the viaduct, the street was narrowed to 33½ feet on each side. It varied some due to the irregular course of the viaduct but the average reduction in the before and after totals of the roadway and sidewalks is 25%.

3. By adding the width of the sidewalks and roadway before and after as to each parcel and taking the difference.

The official Court reporter in the statement of facts just preceding the decision of the Court of Appeals, 306 N. Y. (mem.) 710, at page 731 says; viz; "encroached slightly on the public street" and there was no harm to claimants' property "because it was some forty or fifty feet from the building line and thus too far away to interfere with claimants' easements of light and air." Both statements as shown by State's Exhibit C are not true. Just how much this erroneous statement repeated by the State's Attorney General has adversely affected petitioners, we do not know.

Furthermore if instead of a photo-stat too small to decipher the numerals on it, a sufficiently large reproduction of Claimants' Exhibit 45 was produced, it will clearly show 30 feet as the width of the railroad right of way between Eastern Parkway (Stone Avenue) and Sackman Street. The photo-stat which was supplied by the State and printed at page 499 is too small to decipher it.

The New York State's Attorney General in the State's Brief, in the Appellate Division, Third Department, under Point III, page 15, stated the following:

> "Therefore, this Court should, in the event that it does not reverse and dismiss the claims, order a new trial as the Court did under the same circumstances in St. Peter's Italian Church, Syracuse v. The State, supra, 261 App. Div. 96 that the loss, if any due to the slight interferences, if any, with claimants' easements of light and air over the small part of the street occupied by the improvement may be properly determined."

There again he was asserting that a fifty-three foot highway could only be slightly without a 50 foot railway right of way, which would be true if his facts were true. At least he appeared to be conceding that if there was a substantial taking of the street itself, the petitioners would be entitled to damages.

The Attorney General must admit known facts.

The railroad right of way throughout appears to be 30 feet. See *Long Island Railroad Company* v. *City of New York* (decided October 11, 1910), 199 N. Y. 288 and *Matter of Long Island Railroad Company* (decided November 1, 1907), 189 N. Y. 428, but as to the Eastern group of petitioners we admit that State's Exhibit C, printed in the Appendix, shows there was a variation due to the construction of the former railroad ramp.

We further contend, following the ruling of this Court in *Siegel* v. *New York and Harlem Railroad Co.*, 200 U. S. 544, that the erection of the viaduct highway under the circumstances here set forth in and of itself, entitled petitioners to damages.

POINT III

With further reference to the eastern group of petitioners, they suffered damages by the closing of Williams and Alabama Avenues.

While the Court of Claims allowed damages to all of the petitioners for impairment of their easements of light, air and access, it denied and it did not include any damages to the eastern group of claimants (petitioners) for the

closing of these two streets and this is the feature involved in the Second Constitutional Question which is set forth in the petition herein. This denial by the Court of Claims has been affirmed by both the Appellate Division, Third Department and the New York State Court of Appeals.

We submit that pursuant to the Atlantic Avenue Improvement Act (L. 1897 Ch. 499) it was provided that Williams and Alabama Avenue crossings were to be preserved inviolate. *Matter of Long Island Railroad,* 189 N. Y. 428, at page 441, is to the effect that all streets on the surface of Atlantic Avenue were to be kept unobstructed, open and free for pedestrian and vehicle travel.

Williams Avenue was an open paved street across Atlantic Avenue 60 feet wide used by pedestrians and vehicles and had a clearance of approximately 10 feet (fol. 320). The average automobile is 6 feet high and the trucks vary in height from 8 to 9 feet (fol. 338). Alabama Avenue was an open paved street across Atlantic Avenue 80 feet wide used by pedestrians and vehicles with a clearance of about 14 feet (fols. 321-322). The viaduct highway blocked off and enclosed entirely both of these street crossings. Formerly there was a crossing at East New York Avenue at grade for both pedestrians and vehicles (fol. 429). This was changed and East New York Avenue, put underground in a vehicle underpass under Atlantic Avenue (429-430). On the Southerly side of Atlantic Avenue this East New York Avenue vehicle underpass starts at about Vesta Avenue and on the northerly side of Atlantic Avenue at Williams Avenue (State's Ex. A—received in evidence at folio 990 and to be submitted on the argument of the appeals). With Williams Avenue and Alabama Avenue

entirely blocked off and enclosed in the viaduct highway and with East New York Avenue formerly crossing Atlantic Avenue at grade removed for pedestrian crossing and East New York Avenue depressed in an underpass under Atlantic Avenue for vehicle travel, claimant Cardino (Claim No. 28955) as a pedestrian to cross Atlantic Avenue must travel easterly to Georgia Avenue a distance of 525 feet (fols. 433-434) and westerly all the way to Eastern Parkway (7 blocks) except for the two pedestrian underpasses which are subject to being flooded and are not safe for usage in the evening or night hours (fols. 1344-1345). And for vehicle travel must go to Eastern Parkway (7 blocks) or by a circuitous route use the East New York Avenue vehicle underpass.

We asked the Court of Appeals to take judicial notice of the Traffic Regulations of New York City, and consider the following certification, the original of which was filed in the Appellate Division, *viz.*:

(Letterhead of The City of New York,
Department of Traffic.)

Reuben L. Haskell, Esq.
66 Court Street
Brooklyn 2, N. Y.

Dear Sir:

This will acknowledge your letter of December 3, 1952.

Prior to June, 1941, a vehicle could proceed from the north east or north west corner of Williams Avenue and Atlantic Avenue in a westerly direction along Atlantic Avenue, or in an easterly direction by crossing Atlantic Avenue, or north on Williams Avenue.

Since June, 1941, however, a vehicle starting from this location is limited to travel in a westerly direction on Atlantic Avenue because of the establishing of Williams Avenue between Atlantic Avenue and East New York Avenue, as a southbound one-way thoroughfare and also, the erection of the viaduct highway on Atlantic Avenue.

Very truly yours

/s/ T. T. WILEY

T. T. WILEY
Commissioner

The result is that claimant Cardino prior to the construction of the viaduct highway had three ways of vehicle travel from his property but now has only one way.

Cardino is in the automobile supply business (fol. 485) and his property 2533 Atlantic Avenue is located at the northwest corner of Atlantic Avenue and Williams Avenue. He testified that he lost all of his transient business (fol. 517). The other two claimants on the northerly side of Atlantic Avenue of the eastern group are Maria Grimaldi Claim No. 28956, 2531 Atlantic Avenue adjoining the Cardino property and Maria Pesca Claim No. 28992 who is No. 2525 Atlantic Avenue, four street numbers westerly from Cardino. The two claimants on the southerly side who are inversely affected as to pedestrian and vehicle travel are Antonio Musto Claim No. 28958, two parcels Nos. 2528 and 2530 Atlantic Avenue and Saverio Musto, Claim No. 28959 three parcels Nos. 2532, 2534 and 2536 Atlantic Avenue.

POINT IV

We respectfully submit that the weight of the evidence was with the Trial Judge.

Where the Trial Judge has not only seen and heard the witnesses, but has had the advantage of viewing the premises, his determination should not be disturbed where there is ample evidence to support his findings. *In re Williams and North Williams Streets,* 188 App. Div. 668.

The Appellate Division, Third Department, in its opinion reported in 281 App. Div. 61, advance sheet 719, referred to the open railroad cut as a scar whereas it allowed a clear view across the street and the free circulation of light and air; that if claimants have not been hurt they are not entitled to damages and this despite the height of the viaduct highway and the other circumstances shown herein; that the general conditions have been improved which fails to reflect what a viewing of the premises in front of the properties of the abutting owners would show; the reference to claimants' expert by saying his opinion of diminution of value was largely based on the cutting off of two nearby streets whereas the claimants' expert only so testified while on cross examination as to one of the eastern group of claimants (Saverio Musto Claim #28959), who owned three parcels and his reference to all of the parcels related only to the three parcels of this particular claimant (1151). There was not a scintilla of evidence that he considered the closing of Williams and Alabama Avenues as a criteria as to the western group of claimants (see his cross examination, pp. 383-408). On his direct there is no reference to it (pp. 373-

383)—only his general statement he was familiar with the physical aspects of Atlantic Avenue (pp. 373-374). And on his cross when asked directly as to his consideration of "loss of access" his answer contained no reference to the closing of these two streets (pp. 397-398): also the Appellate Division statement that the viaduct occupied relatively small portions of the public roadway at street level we submit is not supported by the evidence.

The Trial Judge saw and heard all of the witnesses. He personally viewed and inspected the properties (72) as required by Sec. 12(4) of the Court of Claims Act and after weighing and sifting the evidence found the damages to be as set forth in the judgments originally entered herein in the Court of Claims. He was not restricted to a choice between the estimates of warring experts and was in no sense bound by their opinions. *New York Central & H. R. H. R. R. Co.* v. *Newbold,* 166 App. Div. 193, 195. His view of the premises was not mere idle ceremony. It was intended to aid his judgment on the question of damages and to enable him to appreciate the evidence and to give it proper weight. *Perkins* v. *State,* 113 N. Y. 660; *Matter of Thompson,* 127 N. Y. 463, 472; *Matter of Thompson,* 121 N. Y. 277, 278.

The trial of these cases was had on five days extending over the period from May 17, 1949, to April 16, 1951, during which time Judge Gorman (Court of Claims of State of New York) considered the case, viewed the premises, heard the witnesses and was in the best position to judge the weight and credibility to be accorded the evidence.

The matter of denial of damages for the closing of two streets was regarded by the Trial Court, as a question of Law.

As to the Eastern group of Claimants (petitioners), the Court of Claims denied damages as to the closing of two streets saying "They are not entitled to recover for the closing of Williams and Alabama Avenues. Mere inconvenience, where access is not completely obstructed, is insufficient to merit compensation. *Coffey* v. *State,* 291 N. Y. 497" (fols. 71-72).

This second Constitutional Question raised by us should be reviewed as well as the first one. Both Constitutional questions are set forth under the heading of JURISDICTION in the petition annexed hereto.

As to the eastern group of claimants, five in number, where the damages originally awarded were relatively smaller than the others and based in the main on the difference in height of the old railroad ramp as compared with the viaduct highway with denial of damages for the blocking off of two streets, we submit they, like the western group are entitled to have the original judgments of the Court of Claims restored, but are additionally entitled to a new trial to fix their damages for the closing of two streets and this in view of the holding in *Matter of Long Island Railroad Company,* 189 N. Y. 428 where with reference to a prior change of grade proceeding, the Court said at page 442: "The improvement was to leave the avenue 'unobstructed on the surface and open to the free passage of pedestrians and vehicles'."

CONCLUSION

So conclusively apparent does the record disclose an invasion of the petitioners' rights under the Fourteenth Amendment, that the intervention by this Court to prevent a miscarriage of justice and the taking of property rights of the petitioners without just compensation, is imperative.

We respectfully pray that the petition for a Writ of Certiorari be granted.

Dated, August 31, 1954.

Respectfully submitted,

REUBEN L. HASKELL,
Counsel for Petitioners.

APPENDIX A

United States Constitution, Amendment XIV, Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States: nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX B

Judicial Code of the United States, Section 237 (b), as Amended, 28 U. S. C. A., Section 344 (b).

It shall be competent for the Supreme Court by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on a writ of error in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on a writ of error might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph.

STATE'S EXHIBIT C

CASE 2711—ATLANTIC AVENUE ELIMINATION

CHANGES IN GUTTER GRADES AND SIDEWALK AND ROADWAY WIDTHS AT PROPERTIES INVOLVED IN CLAIMS NOS. 28954 TO 28962 AND 28988 TO 28993 AT EAST NEW YORK.

Street Number Atlantic Ave.	Station	Elev. Existing Gutter	Elevation New Gutter	Difference	Width Existing Sidewalk	Width New Sidewalk	Difference	Width Existing Roadway	Width New Roadway	Difference
* 2365	271+20	72.22	72.97	+ .75	20.0	9.0	—11.0	24.9	23.0	—1.9
2533	287+60	59.66	59.79	+ .13	19.9	16.5	— 1.4[1]	22.0	27.0	+5.0
2531	287+35	59.86	59.98	+ .12	19.9	14.0	— 5.9	22.8	27.0	+4.2
* 2363	270+95	72.42	73.14	+ .72	20.00	9.0	—11.0	24.9	23.0	—1.9
2528	287+05	59.17	59.62	+ .45	18.00	14.0	— 4.0	22.8	23.0	+0.2
2530	287+35	59.14	59.47	+ .33	18.3	13.0	— 5.3	21.3	23.0	+1.7
2532	287+40	58.87	59.32	+ .45	18.3	12.0	— 6.3	21.0	23.0	+2.0
2534	286+60	59.57	59.13	— .44	18.7	11.0	— 7.7	26.0	23.0	—3.0
2536	287+80	59.20	58.98	— .22	18.6	10.0	— 8.6	20.2	23.0	+2.8
*2344—46	269+30	74.28	74.57	+ .29	20.00	9.0	—11.0	23.2	23.0	—0.2
2348	269+65	73.88	74.24	+ .36	20.00	9.0	—11.0	23.3	23.0	—0.3
* 2368	271+55	71.77	72.00	+ .23	20.00	9.0	—11.0	24.2	23.0	—1.2
* 2342	268+95	74.61	75.11	+ .50	20.00	9.0	—11.0	23.3	23.0	—0.3
* 2359	270+45	72.95	73.48	+ .53	20.00	9.0	—11.0	24.9	23.0	—1.9
*2354	270+20	73.26	73.62	+ .36	20.00	9.0	—11.0	24.0	23.0	—1.0
2360	270+80	72.59	72.95	+ .36	20.00	9.0	—11.0	24.0	23.0	—1.0
* 2350	269+80	73.88	74.01	+ .13	20.0	9.0	—11.0	25.2	23.0	—2.2
* 2349	269+65	73.90	74.27	+ .37	20.0	9.0	—11.0	25.4	27.0	+1.6
2525	286+80	60.07	60.41	+ .34	20.0	15.0	— 5.0	24.5	27.0	+2.5
*2343	269+05	74.76	75.14	+ .38	20.0	9.0	—11.0	25.8	23.0	—2.8
2345	269+25	74.38	74.85	+ .47	20.0	9.0	—11.0	25.7	23.0	—2.7

NOTE: Grade of sidewalk at building line was unchanged.

Grade Separation Bureau
February 4, 1949
PFL:MAH

PETITIONERS' NOTE ADDED—

By taking total of sidewalks and roadways, before and after, the difference will show the street was reduced from 9.4 to 13.8 feet as to the ten Western group of petitioners and 1.7 to 5.8 feet as to the Eastern group except as to one with a gain of 1.6 feet. Also that the average width of roadway prior was 45 feet and after 33½ feet or a 25% reduction as to the Western group.

[1] should be —3.4.

*indicates the ten Western group of claimants (petitioners).

APPENDIX D

Order

COURT OF APPEALS

STATE OF NEW YORK, *ss.*:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 21st day of January in the year of our Lord one thousand nine hundred and fifty-four, before the Judges of said Court.

Witness,

The HON. EDMUND H. LEWIS,
Chief Judge, Presiding.

RAYMOND J. CANNON,
Clerk.

Remittitur January 21, 1954.

No. 199

FRANK BURO,
Appellant,

—VS.—

THE STATE OF NEW YORK,
Respondent.

(and fourteen other actions)

BE IT REMEMBERED, That on the 30th day of June in the year of our Lord one thousand nine hundred and fifty-three, Frank Buro, & ors., the appellants in these causes, came here unto the Court of Appeals, by Reuben L. Haskell, their attorney, and filed in the said Court Notices of Appeal and return thereto from the judgments of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And The State of New York, the respondent—in said causes, afterwards appeared in said Court of Appeals by Nathaniel L. Goldstein, Attorney General.

Which said Notices of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard these causes argued by Mr. Reuben L. Haskell, of counsel for the appellants, and by Mr. John R. Davison, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgments of the Appellate Division of the Supreme Court appealed from herein be and the same hereby are affirmed with costs.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Court of Claims of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said judgments be affirmed, with costs, as aforesaid.

And hereupon, as well the Notices of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Court of Claims of the State of New York, before the Judges thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Court of Claims, before the Judges thereof, &c.

/s/ RAYMOND J. CANNON
Clerk of the Court of Appeals
of the State of New York

COURT OF APPEALS, CLERK'S OFFICE,
Albany, January 21, 1954.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said causes in the Court of Appeals, with the papers originally filed therein, attached thereto.

/s/ RAYMOND J. CANNON
Clerk

(SEAL)

APPENDIX E

Judgment

STATE OF NEW YORK
COURT OF CLAIMS
Claim No. 28954

FRANK BURO,
Claimant-Appellant,
—against—
THE STATE OF NEW YORK,
Defendant-Respondent.

An appeal having been taken to the Court of Appeals of the State of New York, by the above named claimant-appellant, from the judgment entered in the office of the Clerk of the Court of Claims on the 25th day of March, 1953, upon the order of the Appellate Division entered in the office of the Clerk thereof on the 9th day of March, 1953, reversing on the law and the facts a judgment of the Court of Claims entered in the office of the Clerk thereof on the 20th day of November, 1951, which awarded the claimant-appellant the sum of $1,697.17, and dismissing the claim without costs, and the appeal having been argued on the 13th day of October, 1953, at a session of the Court of Appeals held in the Court of Appeals Hall at Albany, New York, by Reuben L. Haskell, Esq., attorney for claimant-appellant, and by John R. Davison, Assistant Attorney General, of counsel, for Nathaniel L. Goldstein, Attorney General of the State of New York, attorney for defendant-respondent, and after due deliberation that Court having handed down its decision on the 21st day of January, 1954, affirming the judgment so appealed from, with costs, and

the original record on appeal and the remittitur of the Court of Appeals dated January 21, 1954, having been filed in the office of the Clerk of this Court, it is

ORDERED AND ADJUDGED, that the judgment of affirmance of the Court of Appeals be and the same hereby is made the judgment of this Court, and it is

FURTHER ORDERED AND ADJUDGED, that the defendant-respondent recover from the claimant-appellant the sum of $24.61, being the proportionate share of the costs and disbursements as taxed and allowed by this Court.

Dated: Albany, N. Y.
July 6, 1954

JOHN J. CLARK
Clerk of the Court of Claims

NOTE: A Judgment in the same form was entered the same day as to the fourteen other petitioners. The total costs were 15 x $24.61 or $369.15. The State's Bill of Costs was $525.25 but on opposing affidavits, was reduced by the Clerk of the Court of Claims (New York) to $369.15.

OCT 15 1954
HAROLD B. WILLEY, Cl

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 383

FRANK BURO (Claim No. 28954), JAMES CARDINO and MICHAEL CARDINO (Claim No. 28955), MARIA GRIMALDI (Claim No. 28956), MARY MAROTTA (Claim No. 28957), ANTONIO MUSTO and MARIA MUSTO (Claim No. 28958), SALVERIO MUSTO (Claim No. 28959), ANTONIO PETTI (Claim No. 28960), ANGELINA VOLPE and GUISEPPE SCHIBANO (Claim No. 28961), NAT ZIMMERMAN and BENJAMINS REALTY CORPORATION (Claim No. 28962), LUCIA AQUAVELLA, CHARLES P. AQUAVELLA and LORETTA AQUAVELLA (Claim No. 28988), NICOLINA COGLIANO (Claim No. 28989), YOLANDA COGLIANO PESCA (Claim No. 28990), ANTONIO MACCARILLO (Claim No. 28991), MARIA PESCA (Claim No. 28992) and MAMIE SHAKIN (Claim No. 28993),

Petitioners,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

NATHANIEL L. GOLDSTEIN,
Attorney General of the State
of New York,
Attorney for Respondent,
Office & P. O. Address,
The Capitol, Albany 1, N. Y.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 383

FRANK BURO (Claim No. 28954), JAMES CARDINO and MICHAEL CARDINO (Claim No. 28955), MARIA GRIMALDI (Claim No. 28956), MARY MAROTTA (Claim No. 28957), ANTONIO MUSTO and MARIA MUSTO (Claim No. 28958), SALVERIO MUSTO (Claim No. 28959), ANTONIO PETTI (Claim No. 28960), ANGELINA VOLPE and GUISEPPE SCHIBANO (Claim No. 28961), NAT ZIMMERMAN and BENJAMINS REALTY CORPORATION (Claim No. 28962), LUCIA AQUAVELLA, CHARLES P. AQUAVELLA and LORETTA AQUAVELLA (Claim No. 28988), NICOLINA COGLIANO (Claim No. 28989), YOLANDA COGLIANO PESCA (Claim No. 28990), ANTONIO MACCARILLO (Claim No. 28991), MARIA PESCA (Claim No. 28992) and MAMIE SHAKIN (Claim No. 28993),

Petitioners,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable, The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States.

The above entitled claims were against The State of New York and the claim numbers are those of the New York

Court of Claims. The State of New York and not The People of The State of New York as petitioners have designated, is the respondent.

The respondent, The State of New York, opposes the petition for a writ of certiorari for the reason that:

THIS COURT IS WITHOUT JURISDICTION TO ENTERTAIN THE PETITION.

1. The Application Was Not Made Within the Time Limited by Law.

The order of the Court of Appeals of The State of New York (306 N. Y. 730, Petition, pages 11, 12, and Appendix D) herein sought to be reviewed, affirmed on the facts judgments of the Appellate Division, Third Judicial Department of the Supreme Court of The State of New York (281 App. Div. 61; fols. 1627-1656) which reversed on the law and facts judgments of the Court of Claims of the State of New York and directed dismissal of petitioners' claims.

The order of the Court of Appeals was entered in the office of the Clerk thereof on the 21st day of January, 1954 (Appendix D of the Petition).

By another order entered in the office of the Clerk thereof on the 11th day of March, 1954, the Court of Appeals (306 N. Y. 851, Appendix A, *infra*) denied a motion by the petitioners to amend the remittitur of that Court to show that a federal question had been presented and necessarily considered in determining the appeals to that Court.

Thereafter, petitioners made a motion in the Court of Appeals for reargument of the appeals and for reconsideration of their motion to amend the remittitur. Both motions

were denied by the Court of Appeals (306 N. Y. 941, Appendix B, *infra*) by an order entered in the office of the Clerk thereof on the 15th day of April, 1954.

The petition for writ of certiorari and the certified record were filed with the Clerk of this Court on the 4th day of October, 1954.

It thus appears that this application was made 256 days after the order of the Court of Appeals sought to be reviewed was entered in the office of the Clerk of that Court, 207 days after the order of the Court of Appeals denying the motion for amendment of its remittitur was entered in the office of the Clerk thereof, and 172 days after the order of the Court of Appeals denying the motions for reargument and for reconsideration of the motion to amend the remittitur was entered in the office of the Clerk of the Court of Appeals.

28 U. S. C. §2101 (c) provides in pertinent part:

> "Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. * * * "

Petitioners' motion to amend the remittitur of the Court of Appeals did not affect the finality of the order sought to be reviewed and, therefore, that motion did not toll the time to apply for a writ of certiorari. Petitioners' motion for reargument of their appeals to the Court of Appeals did affect the finality of the order sought to be reviewed and, therefore, that motion tolled the time within which the application for the writ could be made. As a consequence, the ninety days within which petitioners could apply for a writ of certiorari again began to run from the date of the

entry of the order of the Court of Appeals denying the motion for reargument, April 15, 1954. The entry of the judgments in the office of the Clerk of the Court of Claims upon the remittitur of the Court of Appeals on the 6th day of July, 1954, was a ministerial act which did not affect the finality of the order of the Court of Appeals sought to be reviewed or, therefore, the running of the time limited by statute for applying for the writ.

Dept. of Banking, etc. v. *Pink* (1942) 317 U. S. 264.

The time within which the application for the writ could be made expired before the petition herein was filed with the Clerk of this Court.

2. The Application Does Not Present a Matter Within the Appellate Jurisdiction of This Court.

Concededly, the order of the Court of Appeals sought to be reviewed does not draw in question "the validity of a treaty or statute of the United States", or "the validity of a State statute * * * on the ground of its being repugnant to the Constitution, treaties or laws of the United States".

Nor does the order sought to be reviewed affect "any right, privilege or immunity * * * specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States." (28 U. S. C. § 1257 (3))*

As noted above, the Court of Appeals denied a motion by petitioners for amendment of its remittitur to show that

* Appendix B of the petition obviously is not the statutory authority for this Court to entertain the petition. The quoted statute was repealed and the pertinent provisions contained therein were reenacted and codified as 28 U. S. C. § 1257(3) on September 1, 1948.

a federal question was presented and necessarily passed upon in deciding the appeals to that Court (306 N. Y. 851, Appendix A, *infra*).

Cf. Lynch v. *New York* (1934) 293 U. S. 52, 54;
Herb v. *Pitcairn* (1944) 324 U. S. 117, 125-128.

The decision of the Court of Appeals in determining the appeals (Petition, pp. 11 and 12), shows that the questions actually presented and decided were: (1) Whether there was such a change of grade that awards of damages could be made therefor under a State statute modifying the common law rule against awarding damages for change of grade and (2) Whether the weight of evidence established that petitioners' properties were damaged by interference with their easements of light and air.

It does not appear from the petition or the certified record that this Court is being asked or could be asked to review the unanimous holding of the New York Court of Appeals that there was not such a change of grade that awards of damages could be made therefor under State law.

On the other hand, it appears from the petition and the certified record that the question that would be presented is not the question stated in the petition.

The question this Court would, and the only question this Court could be asked to determine is: Does the weight of evidence establish that petitioners' property was damaged by interference with their easements of light, air and access?

This is a question of fact and does not involve a matter within the appellate jurisdiction of this Court.

Marchant v. *Pennsylvania Railroad* (1893) 153 U. S. 380, 385;

Harding v. *Illinois* (1904) 196 U. S. 78;
Appleby v. *Buffalo* (1910) 221 U. S. 524, 529;
See e. g. cases cited in *Robertson* and *Kirkham*, Jurisdiction of the Supreme Court §§ 90, 105.

CONCLUSION

The Respondent, The State of New York, Respectfully Submits That The Petition For Certiorari Should Be Dismissed.

October 6, 1954.

Respectfully submitted,

NATHANIEL L. GOLDSTEIN,
Attorney General of the State of New York,
Attorney for Respondent.

WENDELL P. BROWN,
Solicitor General,

JOHN R. DAVISON,
Assistant Attorney General,

Of Counsel.

Appendix A

STATE OF NEW YORK,
IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the eleventh day at March A. D. 1954.

Present, Hon. Edmund H. Lewis,
Chief Judge, Presiding.

———o———

Mo. No. 81

FRANK BURO,
Appellant,

vs.

THE STATE OF NEW YORK,
Respondent.

(and fourteen other actions).

———o———

A motion to amend the remittitur in the above causes having been heretofore made upon the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

A copy

GEARON KIMBALL,
(L. S.) *Deputy Clerk.*

Appendix B

STATE OF NEW YORK,
IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the fifteenth day of April A. D. 1954.

Present, Hon. Edmund H. Lewis,
Chief Judge, Presiding.

———o———

Mo. No. 146

FRANK BURO,
Appellant,

vs.

THE STATE OF NEW YORK,
Respondent.

(and fourteen other appeals).

———o———

A motion for reargument of the appeals herein and for reargument of the motion to amend the remittitur in the above causes having been heretofore made upon the part of the appellants and papers having been duly submitted thereon and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is denied.

A copy

GEARON KIMBALL,
(L. S.) *Deputy Clerk.*

Office - Supreme Court, U. S.
FILED
OCT 23 1954
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1954

No. 383

FRANK BURO (Claim No. 28954), JAMES CARDINO and MICHAEL CARDINO (Claim No. 28955), MARIA GRIMALDI (Claim No. 28956), MARY MAROTTA (Claim No. 28957), ANTONIO MUSTO and MARIA MUSTO (Claim No. 28958), SALVERIO MUSTO (Claim No. 28959), ANTONIO PETTI (Claim No. 28960), ANGELINA VOLPE and GUISEPPE SCHIBANO (Claim No. 28961), NAT ZIMMERMAN and BENJAMINS REALTY CORPORATION (Claim No. 28962), LUCIA AQUAVELLA, CHARLES P. AQUAVELLA and LORETTA AQUAVELLA (Claim No. 28988), NICOLINA COGLIANO (Claim No. 28989), YOLANDA COGLIANO PESCA (Claim No. 28990), ANTONIO MACCARILLO (Claim No. 28991), MARIA PESCA (Claim No. 28992) and MAMIE SHAKIN (Claim No. 28993),

Petitioners,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

REPLY BRIEF FOR WRIT OF CERTIORARI

REUBEN L. HASKELL,
Attorney for Petitioners,
Office & P. O. Address,
66 Court Street,
Brooklyn 1, New York.

32 CASE PRESS, 30 Ferry Street, N. Y. C.—COrtlandt 7-0484-0485

IN THE

Supreme Court of the United States

October Term, 1954

No. 383

FRANK BURO (Claim No. 28954), JAMES CARDINO and MICHAEL CARDINO (Claim No. 28955), MARIA GRIMALDI (Claim No. 28956), MARY MAROTTA (Claim No. 28957), ANTONIO MUSTO and MARIA MUSTO (Claim No. 28958), SALVERIO MUSTO (Claim No. 28959), ANTONIO PETTI (Claim No. 28960), ANGELINA VOLPE and GUISEPPE SCHIBANO (Claim No. 28961), NAT ZIMMERMAN and BENJAMINS REALTY CORPORATION (Claim No. 28962), LUCIA AQUAVELLA, CHARLES P. AQUAVELLA and LORETTA AQUAVELLA (Claim No. 28988), NICOLINA COGLIANO (Claim No. 28989), YOLANDA COGLIANO PESCA (Claim No. 28990), ANTONIO MACCARILLO (Claim No. 28991), MARIA PESCA (Claim No. [illegible]) and MAMIE SHAKIN (Claim No. 28993),

Petitioners,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

REPLY BRIEF FOR WRIT OF CERTIORARI

To the Honorable, The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States.

There does appear to be a misnomer in the name of the Respondent as set forth in the Petition. It should be the State of New York.

This Court Does Have Jurisdiction to Entertain the Petition

1. Under the circumstances of these cases, the application was properly made within 90 days of the entry of the Judgments[1] on July 6, 1954.

In *Dept. of Banking, etc.* v. *Pink* (1942), 317 U. S. 264, it appears, that after the Order and judgment of the Court of Appeals had been made the order and judgment of the Court below (Supreme Court), a motion was made to amend the Remittitur to show a Constitutional question presented and petitioners undertook to apply the 90 day statute to the date when the lower Court directed that the Order amending the remittitur be the order of that Court. The 90 days from the original entry in the lower Court had expired. This Court held that the amending of the judgment was a ministerial duty and did not extend the time.

We submit that amending the judgment to show that a constitutional question was presented is not comparable to the entry of the original judgment by the lower Court on the remittitur where costs are imposed, and as here were fixed by the clerk of the lower Court after a contest. The clerk reduced the State's proposed Bill of Costs from $525.25 to $369.15, and he also had to determine how the total was to be charged against each of the 15 claimants.

The New York State Court of Claims made awards for damages to the easements of light, air and access of the 15 claimants (petitioners) in amounts varying from $400.00

1. Fifteen separate judgments were on July 6, 1954, entered in the New York State Court of Claims on the Remittitur of the Court of Appeals, including costs of $24.61 against each. The total costs were 15 times $24.61 or $369.15.

to $3200.00 and several of the claimants owned more than one parcel, so that if a dollar proportion was used the judgments against each would have been different. And claimants had the right to challenge the action of the said clerk of Court, by proceeding before the Court itself.

Under these circumstances the Order of the Court of Appeals did not have finality until the lower Court entered the Judgments.

2. The application does present a matter within the appellate jurisdiction of this Court.

We are in this Court asking for an allowance of the Writ and a determination that the petitioners have been deprived of property rights without just compensation in violation of the Fourteenth Amendment of the Federal Constitution.

The denial by the New York State Court of Appeals that a federal question was presented and necessarily passed upon, is not final. The last word rests with this Court.

We believe that the decision of the New York State Court of Appeals is contrary to the ruling of this Court in *Siegel* v. *New York & Harlem R. R. Co.*, 200 U. S. 615, where the New York State Court of Appeals (173 N. Y. 644) was reversed.

And certainly the dissenting opinion in the New York State Court of Appeals in the cases at bar (the decision was by a vote of 4 to 3) lends support to the contentions of the petitioners. It is printed at page 12 of the petition, and concludes as follows:

> "As to the alleged damage to claimants' properties by interference with their easements of light and

> air, we conclude that the weight of the evidence supports the holding of the Court of Claims, a member of which court viewed the affected premises."

The New York State Attorney General, in his Brief, does not deal with the facts as set forth in the petition, including the 25% reduction in the width of the street and that the width of the railroad right of way was misrepresented. We interpret his argument to be that the action of the New York State Court of Appeals leaves no question to be determined by this Court. We assert that it is the facts that make the law and that it is for this Court to determine whether petitioners have been deprived of property rights without due process of law in violation of the provisions of the federal constitution. The findings of the Trial Court, the Chief Judge and two of his associates of the New York Court of Appeals justify the contentions of the petitioners.

CONCLUSION

The petitioners respectfully submit that the petition should be granted.

October 22, 1954

Respectfully submitted,

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